

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 25, 2006

STATE OF TENNESSEE v. JULIE FOSTER, ALIAS JULIE JOINES

Appeal from the Circuit Court for Blount County
No. C-15342 D. Kelly Thomas, Jr., Judge

No. E2005-01996-CCA-R3-CD Filed June 5, 2006

Accused of theft of property valued at \$1,000 or more, *see* Tenn. Code Ann. § 39-14-103 (2003), a Class D felony, *see id.* § 39-14-305(3), the defendant, Julie Foster, alias Julie Joines, entered into a plea agreement that reserved for the trial court to determine whether she would be placed in a judicial diversion program, *see id.* § 40-35-313 (Supp. 2005), and if not, the length of sentence and whether she would receive a sentencing alternative to incarceration, *see generally id.* §§ 40-35-104 & -109 (2003). The trial court denied diversion but imposed a suspended Department of Correction sentence of three years. The defendant appealed in a timely manner, *see* Tenn. R. App. P. 37(b)(2)(ii); Tenn. R. App. P. 4(a), and contests the denial of diversion and the length of her sentence. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Raymond Mack Garner, District Public Defender; Shawn G. Graham, Assistant District Public Defender (at trial); and Julie A. Rice, Knoxville, Tennessee (on appeal), for the Appellant, Julie Foster, alias Julie Joines.

Paul G. Summers, Attorney General & Reporter; David E. Coenen, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Michael A. Gallegos, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The presentence report in the present case states that the defendant was convicted of theft from Proffitt's department store and that the defendant, as an employee of Proffitt's, committed the thefts between April 29 and August 29, 2004. The report quotes the defendant: "While [at Proffitt's] I would purchase items on my credit card and 'return' the items for credit to my card or for cash. I also would 'return' fake peoples [sic] items for cash. I basically stole the items."

The report shows that the defendant, who completed high school in 1999, was convicted of driving on a suspended license in 1999 and of driving on a revoked license in 2002.

In her diversion/sentencing hearing, the defendant testified that she was married, 25 years of age, and employed as a receptionist at Honda of Alcoa. She testified that she had worked for Proffitt's but missed work often to transport her mother to obtain medical care, and she stole because she needed to supplement her income. She admitted that she perpetrated 20 to 30 small thefts from Proffitt's during her three-month stint with the department store. The defendant testified, "I don't drink or do drugs or nothing." The defendant admitted, however, that her first offense for unlicensed driving had resulted from the "pulling" of her license when she was charged as a 19-year old with "underage consumption." She recalled that her second driver's license offense resulted from wrecking her husband's car.

The defendant testified that she regretted her behavior and that her theft had disappointed her family, her husband, and her mother-in-law. She acknowledged her greed and stupidity. She offered, "I wanted things I couldn't have" and vowed to never again succumb to the temptation to steal. She testified that her consistent work record was marred only by her larceny from Proffitt's. She testified that she was willing to pay \$200 per month to satisfy her total restitution liability of \$1,774. She testified that she had saved \$950 and could immediately pay that amount on restitution.

The trial court placed the defendant on supervised probation but denied her bid for judicial diversion, noting that the offense was comprised of "about 20-some separate criminal acts [that] show[] a very long disposition to commit crimes."

On appeal, the defendant claims that the trial court's denial of judicial diversion was not based upon a full consideration of the mandated factors, such as her amenability to correction, her physical and mental health, a lack of deterrence value, her home environment, emotional stability, employment record, family responsibilities, lack of criminal behavior or record, and the interests of both her and the public. She also posits that the trial court improperly weighed the continuing nature of her theft. In support of the latter claim, she points out that the state elected to combine her series of small thefts as a means of creating felony liability, whereas none of the individual thefts would have resulted individually in a felony conviction. The defendant further argues that the trial court should have employed mitigating factors to render a minimum two-year sentence.

I. Judicial Diversion

"Judicial diversion" is a reference to Tennessee Code Annotated section 40-35-313(a)'s provision for a trial court's deferring proceedings in a criminal case. *See* Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003). The result of such a deferral is that the trial court places the defendant on probation "without entering a judgment of guilty." *Id.* To be eligible or "qualified" for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not

“a sexual offense or a Class A or Class B felony,” and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id.* § 40-35-313(a)(1)(B)(i). Diversion requires the consent of the qualified defendant. *Id.* § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). A trial court “may” grant judicial diversion in appropriate cases. Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003) (court “may defer further proceedings”). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

“Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion.” *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

[T]he defendant’s criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Id. at 343-44; *see State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id.*

On appeal, this court must determine whether the trial court abused its discretion in failing to sentence pursuant to the statute. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168. Accordingly, when a defendant challenges the denial of judicial diversion, we must affirm if the record contains any substantial evidence supporting the trial court’s decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

In the present case, we are unpersuaded that the trial court abused its discretion in denying diversion. The trial judge expressly reviewed the defendant’s social, family, and employment history and her limited conviction record. Through his questions and comments, the judge demonstrated concern for the best interests of the public and the defendant, giving the defendant credit for diligently saving money for purposes of restitution. The court made no specific

mention of the defendant's physical and mental health, but the record suggests no health-related issues. In the final analysis, the trial court relied heavily upon the nature and circumstances of the defendant's continuing offense in denying diversion. We do not perceive that the trial judge utilized the nature and circumstances of the offense as a sole basis for denying diversion, but had he done so, he articulated reasons why the offense's nature and circumstances outweighed the other factors.

II. Sentence Length

In her other issue, the defendant complains that the trial court erroneously imposed a mid-range sentence of three years. *See* Tenn. Code Ann. § 40-35-112(a)(4) (2003) (establishing a minimum of two years and a maximum of four years for Class D offenses, Range I).

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The sentencing court must consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) & -103(5) (2003).

The record in the present case evinces the trial court's consideration of the principles and relevant factors of sentencing, and the defendant has not overcome the presumption of the correctness of the three-year sentence. We need not belabor our analysis because the defendant's complaint boils down to a dispute about the trial court's weighing of the applied enhancement factors of a record of slight criminal behavior, *see id.* § 40-35-114(1) (2005), and of a weightier abuse of a private trust, *see id.* § 40-35-114(14),¹ *vis a vis* mitigating factors, such as the absence of a threat of bodily injury in the conviction offense, *see id.* § 40-35-113(1) (2003), and defendant's post-offense employment and savings record, *see id.* § 40-35-113(13). As pointed out above, when the presumption of correctness applies, we refrain from re-weighing the relevant factors.

¹The defendant does not challenge the application of enhancement factors.

III. Conclusion

The record supports the trial court's challenged determinations, and we affirm its judgment.

JAMES CURWOOD WITT, JR., JUDGE